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In the Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES F. CHAMPION, APPELLANT,
v.
JOHN C. AMES, UNITED STATES MARSHAL. } No. 106.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

SUPPLEMENTAL BRIEF OF APPELLEE.

JAMES M. BECK,
Assistant Attorney-General.

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Counsel for appellant place so much reliance upon the doctrine of the insurance cases that I venture to submit for the convenience of the court the exact facts in each of those cases upon which the decision was predicated

These cases, in the order of their decision, are as follows:

Paul v. *Virginia*, 8 Wall., 168 (1868).

The legislature of Virginia passed an act which provided that no insurance company not incorporated under the laws of the State should carry on its business within the State without previously obtaining a license for that purpose. By a subsequent act it was provided that no person should, without a license authorized by

law, act as agent for any foreign insurance company, and that every person offering to issue or make any contract or policy of insurance for any company created or incorporated elsewhere than in the State should be regarded as an agent of a foreign insurance company. In May, 1866, Paul, a resident of Virginia, was appointed agent in Virginia of several insurance companies incorporated in the State of New York to carry on a general business of insurance against fire. He applied to the proper officer for a license to act as such agent within the State, but refused to deposit certain bonds which, by the State statute of Virginia, were requisite to the issuance of a license. The license was refused. Notwithstanding this refusal, he undertook to act as agent for the New York companies, and as such issued a policy in Virginia in their name to a citizen of Virginia. For this he was indicted and convicted, and from this conviction an appeal was taken to this court. This court, in an opinion by Mr. Justice Field, after holding that a corporation was not a citizen within the meaning of Article IV, section 2, of the Constitution, sustained the constitutionality of the act upon the following grounds (p. 183):

> The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured for a consideration paid by the latter. These contracts are not articles of commerce in any proper meaning of the word.

> They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. *Such contracts are not interstate transactions, though the parties may be domiciled in different States. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the States any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce.*

Ducat v. *Chicago*, 10 Wall., 410 (1870).

The State of Illinois passed a statute requiring the agents of insurance companies desirous to transact business in the State to take out a license from the auditor of State. Such licenses were from year to year. By a later statute the legislature provided that all foreign insurance companies placing insurance in the city of Chicago should pay to the city treasurer 2 per cent upon all premiums. Ducat was the agent in Chicago of several New York insurance companies and took out his license. He paid the license fee, but refused to pay the 2 per cent to the city of Chicago. The case was argued during the pendency of the case

of *Paul* v. *Virginia*, upon the authority of which the constitutionality of the statutes was sustained.

Liverpool Insurance Company v. *Massachusetts*, 10 Wall, 566 (1870).

This was a tax of the State of Massachusetts upon insurance companies, "incorporated or associated," of 4 per cent upon all premiums charged or received on contracts made in the Commonwealth. Payment was resisted, in part upon the ground that this was not a corporation, and that the tax, in any event, was a regulation of interstate commerce. This court adhered to the decision in *Paul* v. *Virginia*, saying, in an opinion by Mr. Justice Miller (p. 573):

> The case of *Paul* v. *Virginia* decided that the business of insurance, *as ordinarily conducted*, was not commerce, *and that a corporation of one State, having an agency by which it conducted that business in another State, was not engaged in commerce between the States.*

Philadelphia Fire Association v. *New York*, 119 U.S., 110 (1886).

The defendant was a Pennsylvania corporation engaged in fire insurance. In 1872 it established an agency in the State of New York and complied with the necessary statutory requirements to do business in that State, except as hereinafter mentioned. Subsequent to such admission, the State of New York by legislation imposed a yearly tax of 3 per cent on the premiums received by the Philadelphia association in the State of New York in a certain year, and payment was resisted on the ground that this was unconstitu-

tional under the fourteenth amendment. This court sustained the constitutionality of the tax upon the following grounds (p. 119):

> This Pennsylvania corporation came into the State of New York to do business by the consent of the State, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee.

Hooper v. *California*, 155 U. S., 648 (1894).

In this case the State of California provided by act that "the insurance commissioner must require every company not incorporated under the laws of this State, and proposing to transact insurance business by agent or agents in this State, before commencing such business to file in his office a bond," etc., and it is further provided that if any person "*who in this State procures, or agrees to procure, any insurance for a resident of this State, from any insurance company not incorporated under the laws of this State, unless such company or its agent has filed the bond required by the laws of this State relative to insurance, is guilty of a misdemeanor.*" Plaintiff in error was arrested under this criminal statute and was charged with having procured insurance on account

of foreign companies that had not complied with the law requiring the entry of the bond, and was found guilty. It appeared from the agreed facts that the firm of Johnson & Higgins were insurance brokers having their principal place of business in New York; that they had a place of business in the city of San Francisco, State of California, and that the defendant had charge of such business as an agent; that one Mott, a resident of the State of California, applied to Hooper as such agent for certain marine insurance, and thereupon Hooper informed Johnson & Higgins of Mott's inquiry, in reply to which Johnson & Higgins telegraphed Hooper, in effect, that the insurance had been procured. Hooper then communicated the telegram to Mott, and later Johnson & Higgins forwarded a policy in the China Mutual Insurance Company, a foreign corporation which had not filed the bond required by the laws of California, to Hooper, and Hooper then delivered the policy to Mott in San Francisco. Mott paid for the same there, of which payment Hooper advised Johnson & Higgins. This court sustained the constitutionality of the act in an opinion by Mr. Justice White, who, *inter alia*, said (p. 652):

> The contention here is that, inasmuch as the contract was one for *marine* insurance, it was a matter of interstate commerce, and as such beyond the reach of State authority and included among the exceptions to the general rule. This proposition involves an erroneous conception of what constitutes *interstate* commerce. That the business of insurance does not *generically* apper-

> tain to *such* commerce has been settled since the case of *Paul* v. *Virginia*, 8 Wall., 168. See also *Phila. Fire Insurance Co.* v. *New York*, 119 U. S., 110, and authorities there cited.

That this decision was based, as the preceding decisions, upon the theory that the contract between the assured and the insurer was made within the limits of a particular State, is clearly indicated by the learned justice as follows (p. 656):

> It is urged that the words "every person who agrees to procure for a resident of this State," are inconsistent with the preceding language, "who in this State procures," etc. The argument is this: The act punished is procuring for a resident; in order to procure for another the procurer must be the agent of such other; hence the contract of insurance was procured by the agent of the insured, and not by the agent of the foreign company; and inasmuch as the foreign company was not, and under the law could not be, technically, within the State for the purpose of giving its assent to the contract, the insurance must have been procured without the State. The fallacy here is ingenious, but it is easily exposed. The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality. (*Parsons* v. *Bedford*, 3 Pet., 433; *United States* v. *Coombs*, 12 Pet., 72; *Brewer* v. *Blougher*, 14 Pet., 178; *Grenada County* v. *Brogden*, 112 U. S., 261; *Presser* v. *Illinois*, 116 U. S., 252.)
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> The admission that the insurance was procured for the resident from a foreign company,

which had no agent in the State, does not exclude the possibility of its having been procured within the State. *If it were obtained for the resident by a broker who was himself a resident, this would be a procuring within the State and be covered by the statute.*

The business of a broker is to serve as a connecting link between the party who is to be insured and the party who is to do the insuring—to bring about "the meeting of their minds," which is necessary to the consummation of the contract. In the discharge of his business he is the representative of both parties to a certain extent.

Allgeyer v. *Louisiana*, 165 U. S., 578 (1896).

The State of Louisiana provided that any person, firm, or corporation who in any manner whatever does an act in that State to effect for himself or for another insurance on property then in that State in any marine insurance company which has not complied in all respects with the laws of the State, shall be subject to a fine of $1,000 for each offense. Suit was brought against the defendant, Allgeyer & Co., on the ground that they had violated the statute by mailing in New Orleans a letter of advice or certificate of marine insurance to the Atlantic Mutual Insurance Company of New York, advising that company of the shipment of 100 bales of cotton to foreign ports, in accordance with the terms of an open marine policy. Defense was made on the ground that the transactions in question were beyond the jurisdiction of the State of Louisiana; that the contracts of insurance made by the defendants

were made with an insurance company in the State of New York, where the premiums were paid, and where the losses thereunder, if any, were also to be paid, and that the contracts were, therefore, New York contracts. It appeared from the agreed state of facts that the Atlantic Mutual Insurance Company, a New York corporation, had made a contract with Allgeyer & Co. for an open policy of marine insurance for $200,000, by the terms of which it was provided that "shipments applicable to this policy to be reported to this company by mail or telegraph," etc. The Atlantic Mutual Insurance Company had not engaged in the business of marine insurance and had not appointed any agent in the State of Louisiana. Premiums were payable in the city of New York, and were remitted by defendants from New Orleans by exchange. It was admitted "that the contract, i. e., the open policy, was entered into at New York City." This court held that the act was unconstitutional. In discussing the case of *Hooper v. California*, upon which the defendants in error relied, Mr. Justice Peckham says, after stating the facts in the Hooper case (p. 587):

> The court held that the whole transaction amounted to procuring insurance within the State of California by Hooper, residing there and for a resident in the State, from an insurance company not incorporated under its laws and which had not filed the bond required by the laws of the State relative to insurance; that Hooper, the defendant, acted as the agent of his principals in New York City, who were average

> adjusters and brokers there, and who had a place of business in San Francisco, and that Hooper, as such broker, having applied for the insurance to his principals in New York City, received the policy from them for delivery in San Francisco, and the premium was there paid.

In distinguishing the Allgeyer case from the Hopper case Mr. Justice Peckham said (p. 587):

> In the case before us the contract was made beyond the territory of the State of Louisiana, and the only thing that the facts show was done within that State was the mailing of a letter of notification, as mentioned above, which was done after the principal contract had been made.

New York Life Insurance Company v. *Cravens*, 178 U. S., 389 (1900). In this case it was agreed that the defendant was a New York corporation engaged in life insurance. As such, it maintained an agent in the State of Missouri, through whom a policy of life insurance was signed and delivered to one Cravens. The application for the insurance was signed by the agent of the company and forwarded to the home office in New York, and thereupon the policy was issued and transmitted to Kansas City by the company to its agent, who there received the same and there delivered it to Cravens and collected the first premium. Subsequent premiums were also paid in Missouri. The policy lapsed through nonpayment of premiums, and the question was the amount which could be recovered upon it under a local statute of the State of Missouri. By the Missouri statute the

contract was to be construed according to the laws of Missouri, and by the terms of the policy the contract was to be construed according to the laws of New York. It was claimed that the Missouri statute was an attempted regulation of interstate commerce. The lower court sustained the statute on the ground that it was competent for Missouri to prescribe this or any condition as a prerequisite for a foreign corporation to do business within the State, and this view was sustained by this court, citing the previous line of cases.

It is apparent, therefore, that the doctrine of these cases has always been based upon the fact that the method of transacting insurance makes the transaction intra-State, and not inter-State. In the only case in which a State statute was held to be unconstitutional, the contract was made without the State. In every other case the contract was held to have been made by both insurer and insured (the former acting through the local agent), within the particular State.

It is to be observed that no case has as yet squarely presented an insurance transaction which was not thus effected through a local agency. The nearest approach to it is the Allgeyer case, where a citizen of Louisiana made such a contract in New York upon property which was in Louisiana, and it was held that the State of Louisiana could not restrict his freedom even with reference to property within its legislative power. Whether, if Allgeyer had written directly to the New York company and made his application for insurance, and the New York company had sent him to New Orleans by express a policy of insurance, without the intervention of a local agent, the transaction would

become interstate commerce, has not yet been expressly decided by this court. In such a transaction it is obvious that physical interstate transportation twice takes place. The insured would transport across the State boundary his money for a commercial purpose, and in return there would be a physical transportation of the policy. That this is a commercial transaction in the general sense of the term can hardly be questioned. That it is interstate is likewise obvious. It would seem to be intercourse for commercial purposes between citizens of different States within the meaning of Chief Justice Marshall in *Gibbons* v. *Ogden*.

It is, however, not necessary for the court to pass upon this hypothetical case, which is only given by way of illustration, for the case at bar is clearly distinguishable. An insurance policy is not a commodity. It is not a thing which is customarily bought and sold and recognized as a subject of such exchange. Its physical transportation from State to State, therefore, may not be interstate commerce. A lottery ticket, however, as has been amply shown, was, at the time of the framing of the Constitution, a subject of purchase and sale in every civilized country, and is to-day to an extent far greater than is generally believed. The physical transportation, therefore, of such lottery tickets is that of an exchangeable commodity, and as such it is a commercial article, and its transportation is commercial in character.

I venture to suggest one other thought, and that is the extent to which Congress can determine what is an

article of commerce. It is obvious that this question is not wholly or always a question of law. Unquestionably the general principles governing the question are legal in character and exclusively for this court, but their application to particular things may sometimes raise questions of fact as to the usages of the commercial world. In such case to what extent does the judgment of Congress as to such questions affect the matter? In *Leisy* v. *Hardin* (135 U. S., 100, 125) it was said:

> Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we can not hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them.

If the responsibility rests with Congress to determine what things should not be the subject of physical transportation from State to State, why may it not decide incidentally, as matter of fact, what things are thus transported? Congress, in the statute under consideration, has clearly expressed its opinion that the lottery traffic is commercial in character and that its transportation from State to State should be prevented. Does not this act go far to establish the fact of a commercial interstate traffic in lottery tickets? This court has

held that it will not declare any act unconstitutional unless such conclusion is irresistible and beyond any fair doubt, and it has also held that where any statute is under consideration, any construction will be favored which is consistent with its constitutionality. (See *Hooper* v. *State*, 155 U. S., 656). Reading the anti-lottery act from this standpoint, may it not reasonably be regarded at least as persuasive evidence that there is a traffic in lottery tickets, and that, in pursuance of such traffic, such tickets are physically transported from State to State, and that such transportation is a direct injury to interstate commerce? Assuming these facts, the commercial power to restrain can not be questioned.

Respectfully submitted.

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